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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

JAMES G. WATT, ET AL.,
Petitioners,

vs.

STATE OF CALIFORNIA, ET AL.
Respondents.

WESTERN OIL AND GAS ASSOCIATION, ET AL.,
Petitioners,

vs.

STATE OF CALIFORNIA, ET AL.
Respondents.

BRIEF OF RESPONDENTS COUNTY OF HUMBOLDT, ET AL

ROGER BEERS
COUNSEL OF RECORD
KATHRYN BURKETT DICKSON
WILLIAM M. BOYD
Of Counsel
BEERS AND DICKSON
380 Hayes Street, Suite 1
San Francisco, CA 94102
(415) 861-1401
Attorneys for County of Humboldt, et al.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and charter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was based upon the purposes of the CZMA, Congress' understanding of the meaning of "directly affecting" and the statements of Congress in the legislative history of the Act that it intended this provision to apply to OCS leasing, and the interpretation by the federal agency charged with administering the Act.

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BRIEF OF RESPONDENTS COUNTY OF HUMBOLDT, ET AL.

STATEMENT OF THE CASE

The decisions of the courts below require that the Secretary of the Interior conduct an outer continental shelf ("OCS") oil and gas lease sale, designated as Lease Sale 53, "in a manner which is to the maximum extent practicable, consistent" with California's federally approved coastal management program, pursuant to Section 307 (c)(1) of the Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. § 1456(c)(1). Respondents Humboldt County *et al.* (hereinafter "Local Governments") support the affirmance of the decisions below because of their stake in the effectiveness of California's coastal management program in addressing the impacts of OCS leasing and development upon California's coastal zone.[1]

Respondents Local Governments are comprised of 24 cities, counties and regional agencies with jurisdiction over portions of the coastal zone in California. The CZMA contemplates that Local Governments will take an active role in the planning, implementation and decisionmaking with respect to activities and programs that affect their portions of the State's coastal zone. *See, e.g.*, 16 U.S.C. § 1452(2)(H)

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[1]These respondents accept as substantially accurate the statement of the case contained in the Brief for Petitioners Watt *et al.* ("DOI Br.") when supplemented by the statement contained in the Brief for the Cross-Petitioners and the additional matters set forth herein. For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ....." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ....a." References to the Brief of Petitioners Western Oil and Gas Association, *et al.*, ("WOGA") are cited as "WOGA Br. at ....." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

(local government participation in decisionmaking); § 1454 (g) (allocation of funds to local governments); § 1455(c) (2)(B) (mechanisms for continuing participation of local governments in coastal management programs); and § 1456a(a)(1) (funding assistance for local governments under coastal energy impact program).

Under California's federally approved coastal management program, Local Governments have a major role in dealing with OCS development matters, such as the location of onshore support facilities, crude oil treatment and processing systems, oil and gas transportation alternatives, oil spill containment programs and other resource management concerns related to such energy development. *See American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 922-926 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979).

The impacts of OCS development are of particular concern to Local Governments because of the scale and pace of OCS development off the California coast. A total of 239 leases have been awarded in federal areas in proximity to the California coastal zone.[2] Offshore of Santa Barbara County alone, federal oil and gas leases have been granted on 68 tracts in the Santa Barbara Channel, 51 tracts north of Point Conception and on additional tracts south of the Channel Islands—in addition to the state oil and gas leases on 30 tidelands parcels. Onshore support facilities for OCS development currently include twelve separation and treatment facilities in Santa Barbara and Ventura Counties and ten marine terminals located in those two counties and in San Luis Obispo County.[3] Not only have five of the six Pacific OCS sales to date taken place off the California coast but the current federal Five

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[2] Minerals Management Service, Department of the Interior, *Pacific Summary Report* 28 (1982).

[3] *Pacific Summary Report*, *supra* note 2, at 56.

Year Leasing Plan shows one California lease sale per year for the period 1983-1986.[4]

The amount and location of current and proposed OCS development have created complex management issues that must be addressed by Local Governments as well as the State. The application of Section 307(c)(1) to the OCS lease sale stage, under the provisions of the CZMA, is, in the view of Local Governments, vital to their ability to manage, in cooperation with both the state and federal governments, the direct effects on the coastal zone of this accelerated OCS leasing.[5]

SUMMARY OF ARGUMENT

I. In passing the CZMA, Congress declared that there was a "national interest" in the effective management of the coastal zone. Through federally funded and approved coastal management programs, prepared by the states with the participation of federal agencies, it established the mechanism for balancing conflicts such as those between coastal zone protection and the development of energy resources on the OCS. Moreover, Congress recognized that these management programs would be ineffective in protecting the national interest in the coastal zone if they applied only to the actions of state and local governments, and it accordingly required in Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), that all federal activities "directly affecting" the coastal zone be conducted "to the maximum extent practicable, consistent" with federally approved coastal management programs. In this regard, the coastal impact of OCS development was one of Congress' principal concerns in enacting the CZMA, and the legislative history of the Act contains unequivocal statements of Congress' intent that Section 307(c)(1) apply to OCS leasing.

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[4] *Pacific Summary Report, supra* note 2, at 45.

[5] See discussion *infra* at 38-41.

Petitioners take a different view of the national interest. To them, the "national interest" lies singularly in "OCS resource development" (DOI Br. at 48), and they purport to find its confirmation not in the statute under review but in another statute, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331 *et seq.* Although they can point to no specific conflict between any particular directives in the two statutes—and, indeed, acknowledge that the Secretary of the Interior is currently complying with both (DOI Pet. at 19 n. 18)—they nevertheless argue that the lower courts' interpretation of Section 307(c)(1) will undermine the overriding commitment to OCS development which they discern in OCSLA and the procedures established therein for achieving this commitment. DOI Br. at 27-29; WOGA Br. at 21-31. They reach this conclusion by characterizing the application of consistency review to OCS leasing as a potential state "veto" of OCS development. DOI Br. at 26.

However, there is nothing in the text or legislative history of OCSLA or in any canon of statutory construction which suggests that OCSLA provides more definitive guidance for the interpretation of Section 307(c)(1) of the CZMA than does the CZMA itself or its legislative history. Petitioners' argument ignores the "national interest" in coastal zone management reflected in the CZMA, and misconceives the role of the coastal management program and consistency review in fulfilling that interest. Contrary to petitioners' assertions, the lower courts' interpretation of Section 307(c)(1) does not provide the states with any "veto" and does not detract from any paramount rights of the United States in the OCS. It requires only that the Secretary of the Interior comply "to the maximum extent practicable" with the body of law which Congress has determined should be applied to OCS leasing—the coastal management program.

II. The lower courts properly construed the phrase "directly affecting" in Section 307(c)(1) by employing the

tests for the application of this provision which Congress itself formulated in the legislative history of the Act. They properly determined that there was a "functional interrelationship" between OCS leasing and the administration of the coastal zone and that OCS leasing initiated "a series of events which have consequences in the coastal zone." DOI Pet. at 13a, 51a. In place of the language of Section 307(c)(1) and Congress' elaboration of its meaning, petitioners seek to substitute other definitions of their own making on the supposition that the phrase "directly affecting" has one and only one "plain meaning." There is, however, nothing in the lower courts' interpretation of that phrase which departs from any "plain meaning" that it has, and surely nothing which requires that such interpretation be made without regard to the legislative history or purpose of the provision in question, as petitioners contend. Their efforts to demean the significance of OCS leases contradict Congress' own understanding of those instruments as authorizations for OCS development.

III. Petitioners also argue that it is meaningless to render a consistency determination at the stage of OCS leasing because of a host of "uncertainties" and the impossibility of issuing a "guarantee" that all hypothetical future activities will be consistent with a state's coastal management program. What petitioners ignore is that there are vital determinations that can be made only at the lease sale stage. The selection or deletion of tracts for leasing and the establishment of stipulations as the terms of the lease "establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a. If the consistency review procedures as established by Section 307 of the CZMA are deferred to a later time when individual exploration or development plans are submitted on a tract-by-tract basis, the opportunity to apply the broader concerns of the coastal management

program will be foregone entirely. Moreover, the "federal activity" in the OCS process—the *leasing* of the OCS—will never be subjected to consistency review by the federal government. Finally, there is no requirement that the Secretary of the Interior issue impossible "guarantees" in the consistency review process, as applied to OCS leasing. Again, petitioners obscure the important decisions that are made at the lease sale stage and overstate the obligations imposed by consistency review, as the essential premises of their argument.

IV. Petitioners also invite this Court to discard the consistency review process because of their apprehensions that its application to OCS leasing will breed incessant litigation, thwart OCS development and jeopardize the federal-state cooperation in the development of management programs. Based on the experience so far, petitioners' apprehensions appear misplaced. The early application of consistency to OCS leasing will in many instances reduce rather than aggravate conflicts between the competing interests of coastal protection and OCS development. Otherwise, states will be relegated to an essentially defensive or reactive posture in reviewing exploration and development plans submitted individually. More importantly, Congress has decreed that consistency is the prescribed vehicle for ensuring that the national interest in the management of the coastal zone is secured, and the "policy considerations" which petitioners advance provide no basis for a judgment by this Court to the contrary.

ARGUMENT

I. PETITIONERS' ARGUMENTS FAIL TO TAKE INTO ACCOUNT THAT CALIFORNIA'S COASTAL MANAGEMENT PROGRAM IS A FEDERALLY FUNDED AND APPROVED VEHICLE FOR THE PROTECTION OF THE "NATIONAL INTEREST" IN THE COASTAL ZONE AND DOES NOT CONSTITUTE A "STATE VETO" OF FEDERAL ACTIVITIES.

The Solicitor General seeks to dramatize the issue in this case by implying that it pits "the national interest in OCS resource development" against "California's interest in the preservation of its coastal zone." DOI Br. at 48. He asserts, moreover, that the decisions of the lower courts have armed the states with a potent "veto" over OCS development (*id.* at 26), which may be used to defeat this "national interest." What these characterizations fundamentally ignore, however, is that California's coastal management program is not merely a "state law" (*id.* at 13) or a "state administrative process" (WOGA Br. at 3) but a federally funded and approved management program intended by Congress to serve as the vehicle for the protection of a clearly defined "national interest" in the coastal zone.

In passing the CZMA, Congress recognized that coastal management programs could not fulfill this important national objective if they applied only to the actions of state and local governments. Accordingly, in Section 307(c) of the CZMA, 16 U.S.C. § 1456(c), Congress required that the activities of federal agencies "directly affecting" the coastal zone, their development projects "in" the coastal zone, and certain licenses and permits issued by them, be "consistent" with a federally approved coastal management program.

The application of this consistency review to OCS leasing under Section 307(c)(1) does not, however, provide the states with a "veto" over OCS development, as petitioners assert, but rather requires the Secretary of the Interior to ensure that OCS leases are consistent, to the maximum

extent practicable, with the substantive body of law contained in the management program. Thus, petitioners' arguments are premised upon fundamental misconceptions of both the purpose and effect of the federal statute under review, the Coastal Zone Management Act.

A. Congress Has Determined that There is a "National Interest" in the Management of the Coastal Zone.

However narrowly petitioners conceive the "national interest," Congress determined, as the first premise for its enactment of the CZMA in 1972, that "[t]here is a *national interest* in the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451 (a) (emphasis added). It further declared that it is "the *national policy* . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations," and to encourage federal, state and local governments to cooperate in developing and implementing coastal management programs for this purpose. 16 U.S.C. § 1452 (emphasis added).[6]

From the outset, Congress included development of the Outer Continental Shelf among the matters it expected to be addressed by coastal management under the CZMA. For example, Congress recognized that energy demands on the OCS "are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." 16 U.S.C. § 1451(f). It specifically included the "extraction of mineral resources and fossil fuels," among the developments which it found had "resulted in the loss of living marine resources, wildlife, nutrient-rich areas, per-

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[6] The legislative history of the 1972 Act contains pervasive evidence of the broad conception held by Congress of "the national interest" in protection of the coastal zone and its effective management through coastal management programs. *See, e.g.*, S. Rep. No. 753, 92d Cong., 2d Sess. 1-7 (1972); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 9-11 (1972).

manent and adverse changes to ecological systems. . . ." 16 U.S.C. § 1451(c).[7]

In the 1976 Amendments to the CZMA, Congress underscored its original intent that coastal zone management provide the principal means for resolving the conflicts between the accelerated pace of OCS development and other energy facility siting, and the protection of the coastal zone. Thus, it amended the findings in Section 302 to add a reference to the "national objective of attaining a greater degree of energy self-sufficiency" (16 U.S.C. § 1451(j)); it included a specific reference to "energy facilities" as part of the "national interest" which must be given adequate consideration in coastal management programs (16 U.S.C. § 1455(c)(8)); and it required that coastal management programs include a planning process for "energy facilities likely to be located in, or *which may significantly affect, the coastal zone*" (16 U.S.C. § 1454(b)(8) (emphasis added)).[8]

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[7]Congress clearly did not intend that all future development thus affecting the coastal zone be forestalled but rather that it be effectively "managed" so that the national interest in both protection and development of the coastal zone could be achieved. In Congressional hearings preceding the Act's passage, Administration spokespersons, such as Dr. Robert White, the Administrator of the National Oceanic and Atmospheric Administration, emphasized the need for this management approach:

> "The coastal zone is a unique area. Rational management of activities therein is one of the more critical environmental problems facing our Nation. Much of the area is in a state of degradation and under severe competition for various types of economic development.
>
> We feel that the answer here is not to stop development but to provide for orderly and rational utilization of this region."

Coastal Zone Management: Hearings on H.R. 2492, 2493 and 9229 Before the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 273 (1971). ***See also*** S.Rep. No. 753, 92d Cong., 2d Sess. 6 (1972) ("The key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the alternatives").

[8]"Energy facilities" were defined to include "oil and gas facilities, including platforms, assembly plants, storage depots, tank farms,

At the same time, Congress left intact its earlier finding that there was "national interest" in coastal protection. It further required that coastal management programs protect "coastal resources of *national significance*" (16 U.S.C. § 1455(i) (emphasis added)), which were defined to include "any coastal wetland, beach, dune, barrier island, reef, estuary or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value" (16 U.S.C. § 1453(2)).[9]

The gist of the 1976 Amendments was simply a reaffirmation of Congress' determination that the balancing of these competing demands upon the coastal zone be done through coastal management programs. The Conference Report on the 1976 Amendments confirms this approach:

> "The conferees believe . . . that the coastal states and localities, which are closer to and more cognizant of the situation, should make the basic decisions as to the particular needs which result from such new or expanded energy activity; *and . . . that the discretion of the Secretary of Commerce and other Federal officials should be correspondingly limited.*" Conference

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crew and supply bases, . . . refining complexes . . . facilities including deepwater ports, for the transfer of petroleum . . . [and] pipelines. . . ." 16 U.S.C. § 1453(6).

[9]Throughout its deliberation over the CZMA, Congress has recognized that the cumulative destruction from year to year of such "local" resources as a wetland, a beach or an estuary was resulting in the loss of "coastal resources of national significance." *See, e.g.*, H.R. Rep. No. 1012, 96th Cong., 2d Sess. 2 (1980) ("we have damaged or destroyed over forty percent of our wetlands, and we continue to do so at a rate of 300,000 acres per year"). It was the sum total of these losses of "local" resources that occasioned the passage of the CZMA in the first instance and that has been the central concern of Congress in amending and reauthorizing it. In this respect, petitioners fundamentally misconceive the "national interest" when they imply that it is only "*California's interest* in the preservation of its coastal zone" (DOI Br. at 48, emphasis added) which would be served by the application of its management program to Lease Sale 53.

Report, H.R. Rep. No. 1298, 94th Cong., 2d Sess. 24 (1976) (emphasis added).[10]

Finally, in 1980, when Congress reauthorized the CZMA for another 5 years, it stressed once again the fundamental national value of the coastal protection mechanisms established by the Act:

> "It is this rational balancing of competing pressures on finite coastal resources which was intended by the 1972 act and it is the growing awareness that such balancing will be increasingly difficult in the years ahead that argues strenuously for the authorization of, and the improvements made to, the CZMA contained in H.R. 6979." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 33 (1980).

The sole vehicle for ensuring that this sort of "balancing" takes place in the formulation and proposal of federal activities directly affecting the coastal zone is the "consistency" review process established by Section 307(c)(1) of the CZMA.

B. The Requirement of Consistency with the Management Program is Crucial to the Implementation of This National Interest.

The linchpin of the cooperative scheme envisioned by Congress in the CZMA is the coastal management pro-

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[10] *See also* 121 Cong. Rec. 23,055 (1975) (statement of Senator Stevens), 23,081 (Senator Muskie), 23,082 (Senator Kennedy), 23,083 (Senator Pell). Senator Williams, for example, stated:

> "Proposals are being made for a deep-water port, oil drilling and floating nuclear powerplants off our shore, and the only protection our precious coastal resource has is the Coastal Zone Management Act of 1972. This act was created to assist the States in developing adequate controls to prevent damage to the adjacent land and to preserve the fragile ecological balance in coastal areas." *Id.* at 23,084.

The debate in the House was replete with statements by the Representatives to this same effect. *See, e.g.*, 122 Cong. Rec. 6,113 (1976) (statement of Rep. Mosher); 6,113-114 (Rep. Lent); 6,117 (Rep. Forsythe); 6,121 (Rep. Daniels); 6,122 (Rep. Drinan); *id.* (Rep. Ruppe).

gram.[11] Congress authorized federal funding for the development and administration of the programs, and required that they be submitted for federal approval by the Secretary of Commerce under detailed criteria set forth in the Act.[12] The Act also requires that federal agencies participate extensively in the development of the management programs, and that state agencies adequately consider the views of federal agencies in program development.[13]

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[11]A "management program" was defined by Congress to include "a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(12).

[12]Congress has authorized federal grants covering eighty percent of the costs of developing management programs, for each coastal state which demonstrates that the funds will be used to develop a management program consistent with particular criteria set forth in the Act. 16 U.S.C. § 1454. The Act in turn contains detailed requirements which relate to both the process for development of the program and its content. 16 U.S.C. § 1454. Programs which are federally approved qualify for federal funding of eighty percent of their administration costs. 16 U.S.C. § 1455. It should be noted that the Secretary of Commerce has delegated his responsibility under the CZMA to the National Oceanic and Atmospheric Administration ("NOAA").

[13]Congress has specifically declared it national policy "to encourage the participation and cooperation of . . . Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter." 16 U.S.C. § 1452. Thus, federal funds could not be made available for either development or administration of the program—nor could NOAA approve a program—unless it had been developed and adopted "with the opportunity of full participation by relevant federal agencies," among others. 16 U.S.C. § 1455(c)(1); *see also* 16 U.S.C. § 1456(b) (prohibiting the approval of a management program "unless the views of Federal agencies principally affected by such program have been adequately considered"). Any "serious disagreement between any federal agency and a coastal state in the development . . . of a management program" is required to be resolved by mediation. 16 U.S.C. § 1456(h).

Congress would not have required this participation by federal agencies in the development of a management program unless it expected that their activities would in fact be affected by that program. Accordingly, in Section 307(c) of the CZMA, 16 U.S.C. § 1456(c), Congress provided that various activities, development projects, permits and licenses under the jurisdiction of federal agencies be "consistent" with approved coastal management programs. Correspondingly, Congress has recognized that the requirement of consistency represents the "single greatest incentive for State participation in the coastal zone management program." S.Rep. No. 277, 94th Cong., 1st Sess. 9 (1975). As the Ninth Circuit observed, "[a] *quid pro quo* for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan." DOI Pet. at 14a.

It would be anomalous indeed if the federal activity which has the most significant impact upon the coastal zone—oil and gas leasing on the OCS—were not subject to this requirement of consistency. In fact, the legislative history of the subsequent amendments and reauthorization of the Act in 1976 and 1980 reflects Congress' understanding that consistency review of OCS leasing is required under Section 307(c)(1) of the CZMA.[14] Thus, in the present case, the erroneous determination by the Secretary of the Interior that Lease Sale 53 does not directly affect the coastal zone and his consequent refusal to make the consistency determination required by the CZMA, means

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[14]S. Rep. No. 277, 94th Cong., 1st Sess. 3 (1975) (the lack of coordination between coastal states and federal agencies prior to OCS leases could be resolved by "[f]ull implementation of the Coastal Zone Management Act of 1972"); *id.* at 37; S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) ("[t]he Department of Interior's activities which preceded lease sales were to remain subject to the requirements of Section 307(c)(1)"); H.R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (referring to "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases"). *See* also note 49 *infra*.

that an entire body of law that Congress intended be applicable to such federal activities—namely, the coastal management program—has never even been considered or applied by the Secretary.[15]

C. California's Management Program Was Reviewed and Commented Upon by Affected Federal Agencies, Approved by NOAA and Upheld in the Courts as Meeting The Criteria of the CZMA.

Although Congress intended that management programs meeting the criteria in the CZMA would apply to federal activities directly affecting the coastal zone, petitioner WOGA advances certain "policy considerations" for dispensing with their application to OCS leasing. WOGA Br. at 44. WOGA decries "the vague and general policies set forth in state CZMA programs" (*id.* at 45), it purports to critique California's management program

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[15]In all of the respects enumerated above, the consistency review process provided by the CZMA is fundamentally different in purpose and effect from procedures under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* Section 19(a) of OCSLA, 43 U.S.C. § 1345(a)—so heavily relied upon by petitioners—clearly provides states with an opportunity to participate in policy and planning decisions relating to management of the resources of the OCS, by permitting governors to submit "recommendations" to the Secretary regarding the "size, timing, or location" of OCS lease sales. *See* WOGA Br. at 24-25. However, in contrast to the requirements of the CZMA, OCSLA does not require that these recommendations be based on any coastal planning process, does not provide any federal funds for the development of these recommendations and does not require that they consider the views of federal agencies. Moreover, under OCSLA, these recommendations may be entirely *ad hoc*, directed to a single federal activity, and they need not be accepted by the Secretary of the Interior unless they take proper account, in his view, of a reasonable balance between the national interest and the state's interest. 43 U.S.C. § 1345(c). Finally, these "recommendations" can be made by any affected state. In contrast, the "consistency" review process under the CZMA is applicable only to states with federally approved management programs.

(*id.* at 6-10), and it invites this court to "extract" OCS leasing from this "morass" (*id.* at 45). However, these same arguments have already been rejected by NOAA and the federal courts in reviewing WOGA's prior challenge to federal approval of the California management program, and the only forum appropriate for further consideration of these "policy considerations" is Congress, not this Court.

In November 1977, the Secretary of Commerce approved the California Coastal Management Program. In so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered. Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

> "The management program provides for 'adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature.'" *Id.* at 18 (quoting 16 U.S.C. § 1455(c)(8)).

WOGA and the American Petroleum Institute sued to block approval of the California management program. *American Petroleum Institute v. Knecht,* 465 F.Supp. 889 (C.D. Cal. 1978), *aff'd,* 609 F.2d 1306 (9th Cir. 1979). Their suit was brought out of a purported concern that OCS development would be thwarted by the requirement of consistency with the state's management program. 456 F.Supp. at 922. They asserted that the management program had failed to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities, and that it was overly general. 456 F.Supp. at 920-922, 926. However, the District Court and the Ninth Circuit both rejected these claims, and all others that the plaintiffs advanced, and they found that the program did provide for adequate consideration of federal agencies' views and

the national interest. 456 F.Supp. at 889, 922-927; 609 F.2d at 1306, 1313-1315.[16]

Moreover, to suggest, as petitioners do, that this Court may determine under the guise of statutory construction that it is not feasible to apply a coastal management program to a federal activity like OCS leasing would require this Court to substitute its judgment for that of Congress in enacting Section 307(c)(1) of the CZMA.[17] They also ignore the fact that the CZMA, as applied by the lower courts, typifies the approach Congress has taken in recent times in addressing national environmental or resource problems. In a number of contexts Congress has sought to serve national objectives or interests through the encouragement and funding of plans developed by states, in cooperation with federal authorities and under federal criteria, that deal with particular environmental or resource problems.[18] Indeed, in any number of instances

[16]WOGA argues that this decision was the product of "a restrictive standard of judicial review" (WOGA Br. at 6), and liberally quotes certain wry political observations made by the District Court concerning the CZMA in *American Petroleum Institute v. Knecht* (*id.* at 6-7, 45). However, the fact remains that the District Court painstakingly reviewed the California management program in a 43 page opinion and determined that it "takes an approach which has received the congressional blessing." 456 F.Supp. at 926. Moreover, with respect to WOGA's arguments that the program was too general, the District Court pointedly stated that "[t]o the extent plaintiffs seek not guidance with respect to the way in which coastal resources will be managed but instead a 'zoning map' which would implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone, the Court rejects their position." *Id.*

[17]*See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-195 (1978).

[18]*See, e.g.*, Clean Air Act, § 110, 42 U.S.C. § 7410 (Supp. V 1981) (providing for state implementation plans for national primary and secondary air quality standards); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926 (1976 & Supp. V 1981) (authorizing state programs to regulate the treatment, storage, transportation and disposal of hazardous waste, a problem Congress found to be national in scope); Safe Drinking Water Act § 1413, 42

Congress has required that federal facilities or land—like federal leasing of the Outer Continental Shelf—be subject to the requirements of state plans developed to serve these kinds of objectives.[19] The application of coastal management programs to OCS leasing thus serves the "national interest" by a means which Congress has deemed feasible in the CZMA and in numerous other enactments.

D. Petitioners Mischaracterize the Effect of the Consistency Review Process as Applied to OCS Leasing in the Decisions of the Lower Courts.

While according little attention to Congress' concern for the "national interest" in the coastal zone reflected in the CZMA, petitioners on the other hand greatly exaggerate the impact of the application of coastal management programs to OCS leasing. For example, the Solicitor General argues that the lower courts' construction of Section 307(c)(1) "gives California a potential veto over a broad range of federal activities on the OCS not previously considered to be within the reach of state control."

U.S.C. § 300g-2 (1976) (authorizing state programs to enforce national drinking water regulations); Surface Mining Control and Reclamation Act § 503, 30 U.S.C. § 1253 (Supp. V 1981) (allowing for state program of enforcement of national standards for surface coal mining and reclamation); Federal Water Pollution Control Act § 402, 33 U.S.C. § 1342(b) (Supp. V 1981) (allowing states to establish their own permit programs to regulate discharges in order to effect federal effluent limitations).

[19] All of the federal legislation cited in the preceding footnote provides that federal facilities and activities will be subject to state control. *See, e.g.*, Clean Air Act § 118, 42 U.S.C. § 7418 (Supp. V 1981); Resource Conservation and Recovery Act § 6001, 42 U.S.C. § 6961 (1976 & Supp. V 1981); Safe Drinking Water Act § 1447, 42 U.S.C. § 300j-6(a) (Supp. V 1981); Surface Mining Control and Reclamation Act § 523, 30 U.S.C. § 1273 (providing that the requirements of an approved state program must be incorporated in any federal mineral lease for surface coal mining as well as allowing state regulation of surface coal mining on federal lands); Federal Water Pollution Control Act § 313, 33 U.S.C. § 1323 (Supp. V 1981). In *Hancock* v. *Train*, 426 U.S. 167 (1976) and *EPA* v. *California ex rel State Water Resources Control Board*, 426 U.S. 200 (1976), this

DOI Br. at 26. However, the Ninth Circuit took pains in its opinion to dispel any notion that its holding implied that states possessed a "conclusive" or "final veto power" over OCS oil and gas development. DOI Pet at 20a-21a. Indeed, respondents, plaintiffs below, did not argue—and do not argue now—that Section 307(c)(1) grants states any unilateral authority to "veto" particular lease sales—much less any "conclusive" or "final" veto authority.[20]

While the activities of the Secretary of the Interior which directly affect the coastal zone of a state must be consistent "to the maximum extent practicable" with the state's management program, it is the Secretary and not the state who makes that determination of consistency. In that sense, Congress has decreed that once a state's management program has been approved by NOAA as satisfying the criteria of the CZMA, that management program becomes the body of substantive law which thereafter

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Court held that the substantive provisions of state plans developed under the Clean Air Act and Federal Water Pollution Control Act respectively, were applicable to federal facilities, but that state permit requirements were not applicable. Following these two decisions, Congress amended both laws to make clear that state permit requirements also applied to federal facilities. *See* Conference Report, H.R. Rep. No. 506, 95th Cong., 1st Sess. 12 (1977); Conference Report, H.R. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977).

[20]If the Ninth Circuit had confined its opinion to this clarification, respondents would have no quarrel with it. However, the Ninth Circuit not only concluded that the final determination of consistency under § 307(c)(1) rests with the Secretary of the Interior, but also impliedly suggested that the Secretary has discretion to avoid consistency with the state's management program on the basis that OCS activity "would be hampered or proscribed by conformity" with it or apparently on the basis of his views of the "the reasonableness of the state plan." DOI Pet. at 22a. But the fact that it is the Secretary who determines consistency does not mean that he has this kind of broad discretion to act "inconsistently" with the state plan. Respondents submit that the Ninth Circuit's reading of the "maximum extent practicable" language may render the requirement of "consistency" largely nugatory and is entirely unwarranted. We have argued in the Brief in Support of the Cross-Petition that this portion of the Ninth Circuit's opinion was unripe for decision.

confines the Secretary's discretion in OCS leasing—but it has not provided the states in Section 307(c)(1) with anything akin to a "veto." Such a veto would exist only if Congress had provided the states in Section 307(c)(1) with final authority to determine the consistency of the federal activity. Instead, Congress chose to repose the authority to make this determination in the federal agency conducting the activity.[21]

On the other hand respondents submit that the federal agency making this consistency determination is not entitled to disregard the state's views on whether the federal activity is consistent. Presumably the federal agency must accord substantial deference to the interpretation of that

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[21]In contrast, under § 307(c)(3), 16 U.S.C. § 1456(c)(3), which applies to federal permits or licenses, it is the state—not the federal permitting agency—which determines consistency, and a state's determination of inconsistency expressly bars the federal agency from issuing the permit. Congress decided that it would not give a state a "final veto" even in § 307(c)(3), however, but would provide for a federal override of a state's management program, as applied to federal permits or licenses, whenever the Secretary of Commerce determines that such an override would be consistent with the purposes of the CZMA, or in the interests of national security. 16 U.S.C. § 1456(c)(3)(A). It is noteworthy that Congress did not vest that override in the federal permitting agency but in the Secretary of Commerce, as an independent federal agency charged with overall implementation of the CZMA.

It is also significant that Congress originally considered proposals for a federal override of a state's management program under Section 307(c)(1). S.Rep. No. 753, 92d Cong., 2d Sess. 54 (1972). However, it ultimately rejected inclusion of any such override in Section 307(c)(1). *See* Conference Report, H.R. Rep. No. 1544, 92d Cong., 2d Sess. 7 (1972); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972). Apparently, Congress concluded that the balance of federal-state relationships was properly struck there by vesting the *determination* of consistency with the federal agency and not the state, and providing that consistency must be preserved "to the maximum extent practicable." With this protection in place against any possibility of a *state's* abuse of the consistency provision, Congress did not believe it was appropriate to allow the federal agency to "override" the state's management program.

management program by the state agency responsible for its formulation and implementation.[22] Again, however, the states have not been granted any veto.

E. Given the "National Interest" which Congress Sought to Protect Through Coastal Management Programs, it is Clear that Section 307(c)(1) Does Not Detract From Any "Paramount Rights" that the United States Has in the OCS.

The upshot of petitioners' disenchantment with the coastal management scheme established by the CZMA is their request that its application to OCS leasing and development be determined largely by reference to another statute, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* *See, e.g.*, DOI Br. at 27-35; WOGA Br. at 21-32. They assert that any other approach risks subversion of Congress' intent in OCSLA to preserve the federal government's "paramount rights" over the OCS. DOI Br. at 26; WOGA Br. at 18-19. However, petitioners cannot identify any *conflict* between any particular directives in the two statutes. Moreover, their argument again fails to take into account the national interest that Congress sought to protect in the coastal zone and the nature of the system of federal-state coordination that Congress established in the CZMA to serve that interest. When the CZMA is properly understood, nothing in it or in the lower courts' interpretation of it detracts from the federal government's "paramount rights" in the OCS.

WOGA's argument is particularly far removed from any inquiry into the purposes of the CZMA. Rather, it proceeds from the assumption that the principal question before the Court is whether the application of consistency review at the OCS leasing stage would "undermine" the

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[22] Indeed, the regulations promulgated by NOAA contemplate a substantial interplay between the federal and state agencies, in resolving any disputes over whether particular federal activities are consistent. *See* 15 C.F.R. §§ 930.41, .42, comments; 44 Fed. Reg. 37149 (1979).

compromise reached in 1953 over ownership of the tidelands as between the state and federal governments. WOGA Br. at 17. Accordingly, it asks this Court to treat as automatically suspect any interpretation of the CZMA which would "give the states any measure of authority over OCS leasing." *Id.* at 18. However, as WOGA acknowledges, the 1953 Compromise to which it refers, dealt with the question of federal versus state *ownership* of the OCS. *Id.* at 17, 18.

Congress did not purport in that context to limit its own prerogative to take further action to ensure that development of the OCS would be conducted in harmony with other national concerns. That Congress thereafter determined that protection of the coastal zone was in the national interest and chose a vehicle for effective management of the coastal zone—fedrally funded and approved management programs that require federal determinations of consistency—in no way detracts from the United States' "paramount rights" in the OCS.

Respondents submit, moreover, that the fundamental question of statutory interpretation of the CZMA posed in this case must be answered principally by reference to the objectives which Congress sought to achieve by *that legislation.* Petitioners' suggestion that OCSLA, which deals only with development of the OCS, "should be given initial scrutiny" (WOGA Br. at 21) in interpreting the language of Section 307(c)(1) of the CZMA, which applies generally to all federal agencies, is clearly misplaced. In *Chemical Manufacturers' Ass'n v. Environmental Protection Agency,* 673 F.2d 507, 512 (D.C. Cir. 1982), the court rejected a similar argument that one federal statute should "be given precedence over" another. As the court stated:

> "When forced to choose which of two contradictory statutes to enforce, courts may decide that the more specific statute is an exception to the more general one. But if the statutes do not contradict one another

> no choice need be made. . . . [R]egulatory overlap is not the same as a situation where two statutes provide mutually exclusive results when applied to the same facts." 673 F.2d at 512.

See also Morton v. Mancari, 417 U.S. 535, 551 (1974). The court in *Chemical Manufacturers' Ass'n* also emphasized that the two statutes were intended to serve different objectives. 673 F.2d at 512.

In the present case, petitioners can point to no instance where compliance with both OCSLA and Section 307(c)(1) of the CZMA leads to "mutually exclusive results,"[23] and as discussed *infra* at 41-42, the two statutes are designed to foster different national objectives. When the statutory language of the CZMA at issue herein is examined in light of that statute's objectives, it is clear, as the lower courts discerned, that OCS leasing is subject to the consistency review requirement of Section 307(c)(1).[24]

II. THE LOWER COURTS PROPERLY CONSTRUED THE PHRASE "DIRECTLY AFFECTING" IN SECTION 307(c)(1).

The lower courts determined that Lease Sale 53 was a federal activity "directly affecting" the California coastal zone and that Interior was accordingly required to determine the consistency of Lease Sale 53 with the Cali-

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[23]That there is no such conflict between the two statutes is perhaps most evident from the fact that the Secretary of the Interior has been making consistency determinations under Section 307(c)(1) on all OCS leasing subsequent to the Ninth Circuit's decision herein. *See* DOI Pet. at 19 n. 18.

[24]Moreover, since the lower courts' interpretation of Section 307(c)(1) does not in any way detract from the United States' "paramount rights" in the OCS, it cannot be said to *overturn* the kind of "consistent, established rule" for which this Court has required a "clear statement" from Congress. *Ruckelshaus v. Sierra Club*, 51 U.S.L.W. 5132 (July 1, 1983). In any event, as discussed *supra* at note 14, Congress has clearly stated its intent that Section 307(c)(1) apply to OCS leasing.

fornia coastal management program. Their construction of this broad phrase, "directly affecting," does not depart from any "plain meaning" it has. That construction is supported by the purpose and legislative history of the CZMA; it was previously adopted by NOAA, the agency charged with administering the CZMA; and it was recently reaffirmed by congressional statements on the subject.[25] Moreover, that construction is the only way in which the purposes of the CZMA can be achieved with respect to the important federal activity of OCS leasing.

It is surely no departure from any "plain meaning" of Section 307(c)(1) to say that the "direct effects" of a lease are the intended uses of the property leased—in this case oil and gas development on the Outer Continental Shelf. The Ninth Circuit thus correctly viewed Lease Sale 53 as "the first link in a chain of events" which thereafter includes the approval of exploration and development plans, the oil and gas development, and the consequent impacts upon a state's coastal zone. DOI Pet. at 13a.

Petitioners do not dispute that oil and gas development pursuant to an OCS lease may "directly affect" the coastal zone of a state. However, petitioners suggest that an OCS lease is of little or no significance in determining the impact on a state's coastal zone because intermediate federal approvals are required for exploration and development. Thus, the Solicitor General asserts that "a lease does not directly authorize the lessee to explore for, develop or produce oil or gas." DOI Br. at 29. However, Congress itself understood the practical significance of such a lease to be just the opposite. In OCSLA, it defined a "lease" as "any form of authorization which . . . *authorizes exploration for, and development and production of, minerals.*" 43 U.S.C. § 1331(c)(emphasis added).

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[25] In addition to the decisions under review, every other court which has construed this language so far has also reached the same conclusion. *See Conservation Law Foundation v. Watt*, 560 F.Supp. 561 (D. Mass. 1983); *Kean v. Watt*, 18 ERC 1921 (D.N.J. 1982); *California v. Watt*, 17 ERC 1711 (C.D. Cal. 1982).

If no OCS lease is issued, then there will be no oil and gas development and no effects upon a state's coastal zone. If one is issued, its *intended effect* is to produce oil and gas development, which necessarily has coastal impacts[26] Moreover, as the Ninth Circuit observed, "decisions made at the lease sale stage in this case established the basic scope and charter for subsequent development and production." DOI Pet. at 13a.[27]

Petitioners, however, seek to avoid the statutory language "directly affecting" by substituting a variety of phrases for it. For example, they assert that it reaches "only those federal activities that have a clear, immediate and identifiable impact on the coastal zone." DOI Br. at 25.[28] Elsewhere they assert that "direct effects" are those

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[26]The District Court found "ample evidence within the administrative record" that Lease Sale 53 "directly affects the coastal zone." DOI Pet. at 62a-63a. Among the direct effects detailed by the District Court in the area of the tracts challenged by respondents were the oil spills estimated to occur by the United States Geological Survey; the "unavoidable effects . . . on the quality of the surrounding water" from "[n]ormal offshore operations" like pipelaying, drilling, construction of platforms, chronic spills from platforms, and the discharge of treated sewage; the impacts on fish and invertebrate populations from drilling muds and cuttings; the displacement of recreational areas by OCS-related onshore facilities; the disruption of artifacts of historic interest and aboriginal archeological sites known to exist in the area; and "the likelihood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale." DOI Pet. at 63a-65a.

[27]As discussed *infra* at 31-34, the selection or deletion of tracts and the adoption of lease stipulations profoundly affect, *inter alia*, "whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction." DOI Pet. at 13a. Moreover, the lease sale stage is the only meaningful opportunity for analysis of the cumulative effects of development on the tracts leased, as discussed *infra* at 34, 39-40.

[28]Similarly, petitioner WOGA appears to argue that an OCS lease would have such "direct effects" only if there were either a "physical activity" which DOI would conduct at the leasing stage

which occur "proximately" or "without any intervening agency, instrumentality or influence." *Id.* at 21-22; WOGA Br. at 36.[29] However, these are distinctly different formulations than "[t]he plain language of Section 307(c)(1)" (DOI Br. at 25), and are entirely of petitioners' own making.

On the other hand, petitioners devote little or no attention to the definitions which Congress itself has supplied, in the legislative history of the provision at issue. For example, the 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to Section 307(c)(1):

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or activities which OCS lessees would conduct "immediately after obtaining leases." WOGA Br. at 12. Surely, however, the fact that a lease is a piece of paper rather than a "physical activity" is not dispositive of the question, so long as there is a sufficient nexus between the lease and the effects on the coastal zone produced by the intended uses of the property leased. *See Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (rejecting the argument that environmental effects resulted from the lessee's operations and not from the approval of the lease by a federal agency). Nor are these effects any less "direct" because they do not occur "immediately." The fact that OCS development may occur years after the lease rather than the next day does not *ispo facto* make the effects of an OCS lease any less "direct." In this latter respect, the NEPA regulations, relied upon by petitioners (DOI Br. at 22 n. 19, WOGA Br. at 36), which define "direct effects" as those which "occur at the same time and place" as the action, are inapposite. Moreover, it is ironic that petitioners rely upon a definition adopted by an agency without any responsibility for interpreting the CZMA, and at the same time reject the definition adopted by NOAA, the one agency designated by Congress with that responsibility.

[29]As the District Court observed, the tort concepts of "proximate" and "intervening cause" were created by the courts to *limit* tort liability and have no relevance to a statute designed to *foster* intergovernmental coordination in the management of coastal resources. DOI Pet. at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.

> "[I]t is intended that any lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have *a functional interrelationship* from an economic, social, or geographic standpoint with land and waters within the coastal and estuarine zone, should be administered consistent with approved state management programs."

S. Rep. No. 526, 92d Cong., 1st Sess. 30 (1971)(emphasis added).[30] In 1980, when Congress reauthorized the CZMA, Pub. L. 96-464, 94 Stat. 2060 (1980), the House Report restated the 1971 formulation of the "functional interrelationship" test, quoted above, and added this further clarification:

> "Thus, when a federal agency initiates a series of events of coastal management consequences, the intergovernmental coordination provisions of the Federal consistency requirements should apply."

H.R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980); *see also* S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress has thus expressed its own understanding of the meaning of "directly affecting." The consistency re-

[30] As petitioners note, early versions of Section 307(c)(1) applied only to federal activities "in" the coastal zone. DOI Br. at 23. In 1972, the Conference Committee substituted the "directly affecting" language now found in the Act. *Id.* Petitioners assert that Congress intended, nevertheless, to retain the original limitation of Section 307(c)(1) to federal activities "in" the coastal zone and substituted the phrase "directly affecting" to further limit the scope of Section 307(c)(1). *Id.* at 24. Petitioners do not purport to rely on any "explicit legislative history" to support their inference, but merely assert that "it is evident." *Id.* at 23, 24. However, the trial court correctly found that this change was intended to expand the scope of the provision. DOI Pet. at 46a. This conclusion is unavoidable since the language is clearly of broader import than the language originally proposed. Moreover, contrary to petitioners' assertion, the legislative history of the Act reflects Congress' specific intent that the federal activities covered by Section 307(c)(1) include ". . . activities *in or out of the coastal zone* which affect that area." S.Rep. No. 277, 94th Cong., 1st Sess. 37 (1975) (emphasis added).

quirement of Section 307(c)(1) applies whenever the administration of areas under federal jurisdiction and adjacent to the coastal zone, like the OCS, has a "functional interrelationship" with the coastal zone, or whenever a federal agency "initiates a series of events of coastal management consequences," as with OCS leasing. As NOAA has noted, these two tests are interchangeable, and, indeed, were carried forward by NOAA in the regulations promulgated by it under the CZMA, defining "directly affecting." *See* 44 Fed. Reg. 37143 (1979). In those final regulations NOAA expressly stated that "Section 307(c)(1) of the CZMA applies to DOI's OCS pre-lease sale activities directly affecting the coastal zone." *Id.* at 37142.[31]

The lower courts did no more than give effect to these Congressional tests. As the Ninth Circuit stated, "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." DOI Pet. at 13a.[32] Accordingly, it held that Lease Sale 53 was subject to the consistency requirements of Section 307(c)(1).

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[31]That position was restated by NOAA on subsequent occasions, until after the instant suit was filed. At that time, NOAA proposed to revise its regulations to adopt the view previously espoused by Interior that the provision did not apply to lease sale activities. After congressional resolutions objecting to the proposed revision were introduced, NOAA withdrew it. *See* 46 Fed. Reg. 50976-77 (1981); *see also* DOI Pet. at 17a-18a, 57a-58a.

[32]Similarly, the District Court held:

> "Clearly, *the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone.* Any other interpretation would thwart the purpose of the Act." DOI Pet. at 51a (emphasis added).

In *E.E.O.C. v. Wyoming*, 103 S.Ct. 1054, 1062 (1983), relied upon by petitioner WOGA (Br. at 35 n. 27), this Court stated that "a virtual chain reaction of substantial and almost certainly unintended consequential effects" might flow from the application of federal wage and hour laws to the states, as an explanation for its decision in *National League of Cities v. Usery*, 426 U.S. 833,

Petitioners prefer to accord no weight to Congress' own effort to define "directly affecting,"[33] in light of what petitioners conceive to be the "plain meaning" of "directly." DOI Br. at 20-21; WOGA Br. at 21, 35-36. However, when such legislative history is available as an "aid to construction of the meaning of words as used in the statute . . . there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination" to petitioners. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

Moreover, petitioners seek to obscure the purposes of the CZMA, as discussed *supra* at 7-14, despite this Court's observation in *Bowsher v. Merck & Co.*, 103 S.Ct. 1587, 1592 n.7 (1983), that the word "directly" in the statute there reviewed "does not dictate an answer" and that it is necessary to "analyze the policies underlying the statutory provision to determine its proper scope." As discussed next, the courts below did just that in arriving at their interpretation of Section 307(c)(1).

III. THE APPLICATION OF CONSISTENCY REVIEW TO LEASE SALE 53 IS NOT ONLY FEASIBLE BUT ESSENTIAL TO THE ACHIEVEMENT OF THE PURPOSES OF THE CZMA.

The thrust of petitioners' argument has a familiar refrain: that their compliance with the consistency review procedures in Section 307(c) should be deferred until a time when there is "optimal" information available or when "certainty" can be achieved in making these consistency

852 (1975), that such laws operated to "*directly* displace the States' freedom to structure integral operations." (emphasis added). Thus, this Court has recognized, as the Ninth Circuit recognized below, that effects resulting from a chain of events are nonetheless "direct" effects.

[33]In particular, they argue that the 1980 legislative history is entitled to no weight. DOI Br. at 40, 41; WOGA Br. at 42, 43. However, petitioners have ignored the fact that the "functional interrelationship" test is drawn from the legislative history of

determinations. *See, e.g.*, DOI Br. at 18, 43.[34] In fact, as demonstrated below, it is only at the lease sale stage that tract selection and deletion and the promulgation of lease sale stipulations can be dovetailed with the coastal management program. Those determinations can be made on the basis of the information then available. To defer consistency review until "optimal" information is supposedly available will lead to later piecemeal review, and will, indeed, allow the federal government to escape any consistency review of its own actions. As the courts below determined, this "wait and see" attitude would seriously defeat the purpose of the CZMA that there be early application of the management program's strictures to activities which will have an important impact upon the coastal zone.

Congress' deliberations in originally enacting the CZMA in 1972. Moreover, the courts below properly concluded that the 1980 legislative history is entitled to substantial weight. DOI Pet. at 15a-16a, 50a-51a; *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980) and the cases cited therein.

[34]In a host of cases, the courts have rejected agency arguments that performance of their statutory responsibilities should await the day when more information is available and greater certainty could be secured. As the court stated in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976):

> "Awaiting certainty will often allow reactive, not preventive regulation. Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventive albeit uncertain decisions legitimately be so labeled?"

Similarly, in *Illinois v. Gorsuch*, 530 F.Supp. 340, 341 (D.D.C. 1981), the court refused to countenance a further delay in promulgating regulations under a statute because "Congress did not direct the Agency to resolve every conceivable problem before issuing regulations." Finally, in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086 (D.C. Cir. 1973), the court refused to accept the agency's argument that the project was of a "remote and speculative nature" and "remains uncrystalized in form and undetermined in application," as a basis for deferring compliance with NEPA.

A. Certain Vital Determinations of Consistency Can Be Made Only at the Lease Sale Stage.

The Solicitor General asserts that the deferral of consistency review to the time when the lessee submits exploration and development plans under Section 307(c)(3)(B) fully satisfies the purposes of the CZMA and renders it unnecessary to apply Section 307(c)(1) to the precedent issuance of OCS leases. *See* DOI Br. at 47-48. The answer to this argument was supplied *by the Department of Justice* in rejecting identical arguments made by the Department of the Interior only four years ago:

> "Paragraph (B) [of Section 307(c)(3)] is designed to relieve the lessee of the burdens and delays resulting from successive consistency determinations for the many license and permit applications that may follow the grant of a lease and the approval of an exploration, development, or production plan. Under § 307(c)(3)(B) there will be a single consistency review following the submission of the plan by the lessee, and that review will cover any future activities described in detail in the plan. Section 307(c)(3)(B) thus simplifies the regulatory process during the post-leasing period. *It has no bearing on the consistency requirements antedating that stage of the leasing process. It is well possible that some of the preleasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph (B) procedure, or for which such review comes too late. It is our opinion that with respect to pre-leasing activities § 307(c)(1) and § 307(c)(3)(B) can both be given effect. . . .*"[35]

Because Lease Sale 53 defined the physical and operational parameters for all of the subsequent exploration and

[35]Letter, April 20, 1979, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of the Interior, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Cal. Exh. L-15, J. A. at 43 (emphasis added).

development, it will certainly "give rise to consistency problems which cannot be reviewed at all" under Section 307(c)(3)(B) "or for which such review comes too late."[36] Fundamentally, the lease sale creates a *subdivision* of the OCS. It establishes those tracts where development may occur, specifies through lease stipulations the conditions for such development, and excludes other areas from development altogether.[37] As the Ninth Circuit held below:

> ". . . decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction." DOI Pet. at 13a.[38]

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[36]A decision of the Department of the Interior to offer thousands of acres of the OCS for development "is regarded as among the most significant Federal actions affecting the Coastal Zones." Staff of Senate Comm. on Commerce, 93d Cong., 2d Sess., *Outer Continental Shelf Oil and Gas Development and the Coastal Zone* 79 (Comm. Print 1974).

[37]In this respect it is analogous to the subdivision of land by local governments. Just as Interior retains the right to approve exploration and development on the subdivided tracts, so local governments retain the authority to approve or deny building permits for homes on lots created pursuant to a subdivision of land. Nevertheless, a local government's approval of the subdivision itself is considered to be the major land use decision because it determines which areas will be made available for development and which areas will require support services. Moreover, just as Interior sets stipulations in its lease sale, local governments also typically attach conditions to their approval of a subdivision map that determine the primary conditions under which development will be allowed to proceed, if at all. *See generally* J. Rose, *Legal Foundations of Land Use Planning* 315-54 (1979).

[38]Indeed, outside this litigation, the Department of Interior has characterized the effect of an OCS lease in the same manner:

One significant decision made in offering an OCS area for leasing is the selection or deletion of particular tracts. Thus, tracts under consideration for leasing may lie in proximity to what Congress identified in the CZMA as a "coastal resource of national significance," such as a "coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat." 16 U.S.C. § 1453(2). To the extent these areas of national significance have been identified in a coastal management program pursuant to Congress' mandate, and provisions to protect these resources have been established therein, leasing for oil or gas development anywhere in their vicinity may be undesirable—regardless of its precise ultimate location.[39]

". . . the leasing of OCS land sets in motion a process which can affect interests at all levels, and many decisions are made in that process which, in part, determine the manner in which any subsequent development may take place." Department of Interior, Bureau of Land Management, *Intergovernmental Planning Program for OCS Oil and Gas Leasing, Transportation and Related Facilities* 4 (1979). As Interior has further stated:

> "The tentative scheduling of an area for OCS leasing is a *major decision* in that it *establishes* the resource use conflict by identifying the potential new use (oil and gas extraction) that will possibly *conflict with present uses (fishing, recreation, transportation, etc.)*. . . .
>
> Stipulations, operating orders and tract deletion are the most prominent administrative mechanisms through which to apply environmental information. (Note: Stipulations are formulated and required at the lease sale stage.)."

Department of Interior, Bureau of Land Management, *Study Design for Resource Management Decisions: OCS Oil and Gas Development and the Environment* 2-1 (1978).

[39]As part of its objections to the leasing of certain tracts in the Santa Maria Basin in Lease Sale 53, the California Coastal Commission noted that "a large spill in the Santa Maria Basin, where BLM predicts 3.25 large spills over the life of the producing fields could jeopardize the entire population of the threatened sea otter." J. A. at 124. Moreover, contrary to petitioners' characterization, the Commission was concerned also about the protection of additional important resources, other than the sea otter. *Id.* at 122.

Similarly, the topography or weather conditions of an area may make valuable resource areas particularly vulnerable to OCS development.[40] Consistency with a management program which takes cognizance of these conditions may require that no development—again, regardless of its precise location—be allowed within that area. As a final example of a matter of concern in a management program, a tract under consideration for leasing may be unduly close to established pathways for ocean vessel traffic.[41] Depending on the circumstances, sufficient information may clearly exist in any of these situations to make decisions at the lease sale stage as to whether or not particular tracts should be offered.

The second important decision made at the leasing stage is the inclusion of particular stipulations as terms of the lease sale. As the District Court noted, stipulations may be drafted to "influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction . . . [and to] determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts." DOI Pet. at 45a-46a. For example, lease sale stipulations, together with tract selections, can provide assurance (or at least preserve the option) that pipelines, environmentally preferable in some cases to tankering as a means of bringing oil to shore, will be required in connection with the

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[40]The Coastal Commission expressed particular concern, for example, about the proximity of Lease Sale 53 to rocky areas along central and northern California with small coves or bays, where cleanup of oil spills would be difficult and the heaviest damage to marine life would occur. J.A. at 124. It also noted that wind and wave conditions near Elkhorn Slough, a National Estuarine Sanctuary, and Tomales Bay, adjacent to the Point Reyes National Seashore, would make containment of oil spills nearly impossible in those areas. *Id.*

[41]The Coastal Commission's comments on Lease Sale 53 expressed concern about this problem. *See* J.A. at 124.

development of tracts."[42] Indeed, as the Coastal Commission has itself noted in the context of Lease Sale 53, lease sale stipulations may be an effective alternative for avoiding the necessity of tract deletions, in order to protect resources identified as valuable in the coastal management program. J.A. at 77.

Without question, in some instances the decisions required to tailor OCS development to the provisions of a coastal management program will be appropriately made on a tract-by-tract basis when individual exploration or development plans are submitted to the state for consistency review under Section 307(c)(3)(B). Other decisions, as described above, are inherent in the selection or deletion of tracts and the setting of stipulations, and can thus only be made at the lease sale stage. As the Ninth Circuit observed regarding Lease Sale 53:

> "[A]t this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the latter stages consistency determinations would be made on a tract-by-tract basis under § 307(c)(3)." DOI Pet. at 13a.

In sum, these are "consistency problems which cannot be reviewed at all" under Section 307(c)(3)(B) or "for which such [later consistency] review comes too late." J.A. at 43.

B. Contrary to Petitioners' Assertions, Sufficient Information Exists to Make These Consistency Determinations at the Lease Sale Stage.

Petitioners assert that a host of "uncertainties" at the OCS leasing stage make it impossible to "guarantee" that all subsequent development will be consistent with a coastal management program. DOI Br. at 43. However, they do

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[42]Thus, tracts can be aggregated and leased concurrently so that they afford the greatest potential for sufficient oil developments occurring together to justify pipelines as an economical matter.

not take account of the information which is both available at the leasing stage and sufficient to make the kinds of determinations described above, and they improperly characterize the consistency review as requiring impossible "guarantees." Their own practices in prior lease sales belie the abstract arguments made here.

For many of the coastal management concerns associated with a particular lease sale, it is simply immaterial that there may be a "series of sequential unknowns" (DOI Br. at 45) which make it impossible for the Secretary to predict with certainty at the lease sale stage whether or precisely where OCS development will occur. If proposed tracts are in proximity to a particularly sensitive wildlife habitat or particularly volatile seas, he need not await the expenditures of significant sums of money by the oil companies in planning and exploration before deciding that these tracts are simply not appropriate for any kind of oil development.[43] Alternatively, these environmental conditions may dictate certain lease sale stipulations in order to achieve consistency with a management program,

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[43]Nor does Interior correctly portray the state of its own knowledge at the time a lease sale is made. Several years of preparation and study by Interior precede each lease sale. In addition to the information developed and reviewed in the draft and final environmental impact statements on Lease Sale 53, for example, special studies were done that included oil spill risk analyses, alternative oil and gas transportation scenarios, analyses of the sensitivity of marine life in the area to development disturbances, and air quality modeling of projected impacts of the lease sale. Moreover, as a part of these presale preparations, Interior and the oil industry expend considerable effort to determine the size and location of potential oil reserves. *See, e.g.*, Final Environmental Impact Statement on OCS Lease Sale No. 53, C.R. 3, Cal. Exh. L-2 at 1-9—1-13. As the District Court held, the activities that occur during this period, including the call for nominations of tracts, the preparation and circulation of an environmental impact statement, and the publication of a final notice of sale, "define and establish the basic parameters for subsequent development and production." DOI Pet. at 45a.

as previously noted—regardless of the precise location of development thereafter.[41]

At bottom, the asserted handicaps in making these kinds of determinations stem from a fundamental misconception of the nature of the consistency obligation. The application of Section 307(c)(1) to the lease sale does not require that the Secretary of the Interior issue impossible "guarantees," based upon "speculative assumptions" that all "hypothetical future activities" will be consistent with a coastal management program. DOI Br. at 49.

The essential inquiry in consistency review is not one which requires the capacities of a soothsayer. Rather, as the California Coastal Commission stated in its comments on Lease Sale 53, the question is whether the available information allows the Department of the Interior "on balance, *at this time* under the Management program to determine that there is *no way* to develop those tracts

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[41]In the example drawn by the Solicitor General (DOI Br. at 46), if there is "an unacceptably high risk" of an oil spill in the area of a particularly valuable fish or wildlife habitat but no similar concern associated with the potential development of "commercially valuable natural gas," the solution might be a lease stipulation that industry would only be allowed to produce gas and not oil on these tracts. Similarly, "if it may be possible," as the Solicitor General surmises, to develop a plan later that "will reduce the risk of an oil spill to a level acceptable to the state" (DOI Br. at 46), then it may also be "possible" to draft stipulations at the OCS leasing stage to provide the requisite assurances that development would not be allowed in the absence of such reduced risk. On the other hand, the Secretary might determine, based on the requirements of the management program, that it was not possible to reduce the risk to an acceptable level and delete the tracts at the outset. In any of these circumstances, industry and state and local governments would be able to proceed with their planning with an understanding of where development will be allowed and under what conditions, based on the Secretary's application of the coastal management program.

consistent with the policies of the California Coastal Act." J.A. at 78 (emphasis added).[45]

Indeed, the phased decisionmaking process established under OCSLA, upon which petitioners place such heavy reliance, does not require that all important decisions be deferred to later stages of the OCS process, as petitioners imply. DOI Br. at 27-35; WOGA Br. at 21-31. Decisions are made at each stage appropriate to the level of information available at that stage. As stated by the Court of Appeals for the District of Columbia Circuit, in reviewing Interior's five-year leasing program, the procedures embodied in the 1978 OCSLA Amendments are "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). In that case, the court rejected the same arguments made by Interior here, that the information at early stages of the OCS process was too "speculative" to consider:

> "Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attaches thereto in drawing up the leasing program, § 18(a)(2) nonetheless requires the Secretary at the program stage to consider every factor listed therein on the basis of the best information available, and to base the leasing program upon the information thereby obtained." *Id.* at 1307.

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[45] In its initial review of Lease Sale 53, the Commission determined that the information available at the time required the deletion of only 31 of the 113 tracts in the Santa Maria Basin of the OCS. The Commission made clear that it was not implying that "all development of the other 82 tracts would be consistent" when exploration or development plans were submitted, but only that there were no reasons, on balance, at that time to determine that there was "no way" to develop those tracts consistently with the management program. J.A. at 78.

In fact, in past lease sales the Department of Interior has made the very kinds of determinations that would be required of it in consistency review. For example, in Lease Sale 48, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel at the lease sale stage expressly for a purpose similar to one of the state's concerns in Lease Sale 53—"[t]he objective of protecting the valuable seabird and marine mammal rookeries" in that part of the sale area.[46] In addition, Interior has previously conceded that imposition of lease stipulations can substantially reduce adverse coastal impacts which would otherwise occur.[47]

There is simply no practical foundation for petitioners' arguments that there is insufficient information at the lease sale stage to render meaningful determinations of consistency.

C. Deferral of Consistency Review to the Exploration and Development Phase Defeats the Essential Purposes of the CZMA.

If the strictures of a coastal management program are applied only to individual exploration or development plans on a tract-by-tract basis, then the broader concerns of the management program will be foregone entirely.

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[46]Letter from Secretary Andrus to Governor Brown (June 29, 1979). Similarly, in partial response to some of the other concerns expressed by the State of California with respect to Lease Sale 48, Secretary Andrus determined that there would be no petroleum exploration rigs in the vessel precautionary area outside the Ports of Los Angeles and Long Beach; determined that there would be no oil or development within six miles of the Santa Barbara Channel Islands, thus protecting the wildlife there from disturbance and preserving the option of designating that area as a marine sanctuary; and made the addition of petroleum reserves in the western Santa Barbara Channel more likely, thereby increasing the prospects for adequate oil production in that area to justify construction of a pipeline in place of tankers to carry oil to market. *Id.*

[47]Solicitor's Opinion (October 1979), C.R. 3, Cal. Exh. L-11 at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir. 1978).

Moreover, the impetus which the CZMA was intended to give to *early* intergovernmental coordination—among federal, state and local governments—in dealing with coastal management problems, will be frustrated. Indeed, the federal government would thereby be excused from all responsibility to assure that *its activities* are consistent with coastal management programs. In all of these respects, petitioners' attempt to avoid consistency review at the lease sale stage defeats the basic purposes for Congress' enactment of the CZMA.

Evidence presented by respondents in the District Court graphically demonstrated the piecemeal and random manner in which the exploration and development plans in the Santa Barbara Channel, for example, were submitted by the lessees for the state's consistency review under Section 307(c)(3)(B). Affidavit of Mari Gottdiener, J.A. at 152-155. In the two and one half years after the federal approval of California's management program, 27 different exploration or development plans were submitted randomly for different tracts within this single area. *Id.* The broader concerns of the California coastal management program—*e.g.*, determination of which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore support facilities should sensibly be located—are impossible to address when consistency review is this fragmented.

In *California v. Watt*, 668 F.2d 1290, 1306 (D.C. Cir. 1981), the court noted that "[w]hen a decision is being made on a particular lease sale, or a particular exploration, development or production plan, the focus of the inquiry is on the propriety of that particular lease sale or plan." Accordingly, the court concluded that it was impossible to address the broader concerns of OCS development (in that case, the five year leasing program) *"in the context of a decision on the placement of a particular exploratory well."* *Id.* at 1306 (emphasis added). Yet, this is precisely

the burden which petitioners here seek to thrust upon state and local governments by suggesting that consistency review can be deferred to the exploration and development phases.

In reviewing the five year leasing program, the court in *California v. Watt* emphasized that the earlier steps in the OCS process become "the basis for future planning by all affected entities, from federal, state, and local governments to the oil industry itself" (668 F.2d at 1299) and held that Congress therefore did not "envision the deferral" of Interior's consideration of the relevant factors until some later date when more information would be available. 668 F.2d at 1305. These same concerns underlie the Ninth Circuit's ruling in the instant case:

> "Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement." DOI Pet. at 14a.[40]

Finally, it bears emphasis that if consistency review is not undertaken at the lease sale stage, but is deferred to the time when exploration or development plans are submitted, then the "federal activity" in OCS development

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[40]Despite the Solicitor General's contrary assertion (DOI Br. at 42), "the immediate purpose of Section 307(c)(1)'s consistency requirement *is* . . . to provide coastal states with an opportunity to participate in the initial decisionmaking or planning stages of federal activities on the outer continental shelf." *See* S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) ("intergovernmental coordination for purposes of OCS development commences at the earliest practicable time").

escapes consistency review altogether and the Secretary of the Interior will never be required to take into account the coastal management program in this context. Once the lease sale occurs, the initiative passes to industry. The later review is confined to plans for specific tracts submitted by each lessee, in the order and time of its own choosing, and it is the applicant—not the Secretary—who must certify consistency at that stage under Section 307(c)(3). From a practical standpoint, the lease sale is thus the only stage at which certain matters can be decided effectively—or, indeed, at all—by the federal government.

D. The Consistency Review Process Required Under Section 307(c)(1) Is Not Rendered Superfluous by the OCSLA Consultation Process at the Lease Sale Stage.

Petitioners also argue that Section 307(c)(1) is superfluous because of the opportunities for consultation accorded the states prior to OCS leasing under Section 19 of OCSLA, 43 U.S.C. § 1345. DOI Br. at 42. Indeed, petitioner WOGA argues that consistency review at the leasing stage is unnecessary because the coastal management program may be considered by the Secretary of the Interior through the back door of the consultation process under Section 19 of OCSLA. WOGA Br. at 26, 27. However, it is for Congress to decide whether its goals can be achieved through one statute or two, and it is clear that OCSLA and the CZMA were enacted to serve markedly different objectives (and establish distinctive procedures, as discussed *supra* at note 15).

The basic orientation of the CZMA and OCSLA differ considerably. As the District Court concluded in *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979):

> "The CZMA was enacted primarily with a view to encouraging the coastal states to plan for the management, development, preservation, and restoration of their coastal zones by establishing rational processes by which to regulate uses therein. Although sensitive

> to balancing competing interests, it was first and foremost a statute directed to and solicitous of environmental concerns."

On the other hand, in *Commonwealth of Massachusetts v. Andrus*, 594 F.2d 872, 885 (1st Cir. 1979), the Court described the "emphasis" of OCSLA as the "exploitation of oil, gas and other minerals, with, to be sure, all necessary protective controls." Accordingly, it would be a mistake to assume that the same objectives could be achieved through the application of OCSLA that were intended to be achieved by Congress through the specific mechanisms set forth in CZMA.

This Court has, moreover, recently rejected a similar invitation to determine whether particular federal laws are "redundant or unnecessary." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 283 (1981). As stated in the *Hodel* case: "The short answer to this argument is that the effectiveness of existing laws in dealing with a problem indentified by Congress is ordinarily a matter committed to legislative judgment." *Id. See also Chemical Manufacturers' Ass'n v. Environmental Protection Agency*, 673 F.2d 507, 512 (D.C. Cir. 1982).

For the same reason, it is inappropriate for petitioners to argue that Congress' omission from the text of OCSLA of a specific reference to Section 307(c)(1) of the CZMA somehow disqualifies the latter provision from applying to OCS leasing.[49] Indeed, there are a number of statutes which

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[49]Petitioners argue that because OCSLA makes specific reference to the application of consistency review at the exploration and development stages of the OCS process, the omission from the statute of any reference to its application at the leasing stage is dispositive. *See* WOGA Br. at 21-31. However, as both petitioners concede, the legislative history of OCSLA itself shows congressional understanding that "under the [CZMA] . . . certain activities including *lease sales* and approval of development and production plans must comply with 'consistency' requirements. . . ." H.R.Rep. 590, 95th Cong., 1st Sess. 153 n.52 (1977). This unqualified statement, consistent with other Congressional expressions of intent

have application to OCS development which are not referred to in OCSLA.[50] Accordingly, there is no warrant for any restrictive reading of the consistency requirement in Section 307(c)(1) of the CZMA by reason of the existence of the OCSLA consultation process, or any provision in OCSLA itself.

IV. THE DECISIONS OF THE LOWER COURTS DO NOT PORTEND AN INCREASE IN LITIGATION OR A REDUCTION OF ENERGY DEVELOPMENT OR A LOSS OF FEDERAL-STATE COOPERATION

Petitioners raise the specter of additional litigation and reductions in OCS development and federal-state cooperation as the likely products of the decisions below. Although such contentions are more appropriately addressed to Congress' legislative judgment, there is no warrant for peti-

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discussed *supra* at note 14, certainly does not fit petitioners' characterization of it as "a meager indication" (WOGA Br. at 26 n. 19) or a "hint" (DOI Br. at 34 n. 26) of congressional intent. Even so, petitioners have omitted the immediately succeeding statements in the report which underscore Congress' intent with respect to OCS leasing:

> "Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this Act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan." H.R.Rep. No. 590, *supra* at 153 n. 52.

In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. § 1866, which specifically provides that "nothing in this chapter shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972."

[50]These statutes include the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Deepwater Ports Act, 33 U.S.C. §§ 1501 *et seq.*

tioners' apprehensions that adherence to the decisions below will cause any disruption of OCS activities.

Consistency determinations are now being prepared by the Department of the Interior on all OCS lease sales without any apparent undue burden. *See* DOI Pet. at 19 n.18. In fact it is certainly arguable that there will be *less* delay and disruption of OCS leasing if coastal management programs are applied in Section 307(c)(1) consistency review at the lease sale stage, under the decisions of the lower courts, than if the states and local governments are relegated to review of individual exploration and development plans under Section 307(c)(3)(B) at a later stage of the process. As the District Court found:

> "If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decisionmaking envisioned by the draftsmen of the CZMA." DOI Pet. at 46a.

NOAA has similarly observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socio-economic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources.*" 44 Fed. Reg. 37142 (1979) (emphasis added). Indeed, after California's objections to Lease Sale 48 were communicated to the Secretary of the Interior, the Department of Interior (although refusing to make a consistency determination) did subsequently delete the tracts which California found objectionable and California did not bring suit. Thus, WOGA's characterization of the

CZMA process as "merely a prelude to later federal litigation" (WOGA Br. at 14) is misplaced.[51]

Finally, petitioners assert that the lower courts' construction of "directly affecting" makes it impossible for a federal agency to determine "which of its activities will be implicated by the state program" and renders its participation in the *development* of management programs superfluous. DOI Br. at 25 & n. 21. However, petitioners' arguments are belied *by their own participation* in the development of California's management program. In its comments on the program prior to federal approval, the Department of the Interior specifically addressed the issue of whether the program applied to OCS leasing under consistency review. California Coastal Management Program, C.R. 3, Cal. Exh. L-18, Attachment J at 20. Both WOGA and the American Petroleum Institute, as well as Exxon Corporation, also commented on the OCS implications of the management program. *See, e.g., id.* at 29, 33, 34, 37, 40.[52]

Petitioners' apprehensions are, moreover, beside the point. Congress has determined that the national interest in the coastal zone is best served by federally funded and approved coastal management programs, developed by states in cooperation with the federal government. Throughout its deliberations over the original enactment of the CZMA and its subsequent amendments and reauthorization, it has expressed its concern about the impact of OCS development on the coastal zone, and it has on a

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[51]In addition, the Coastal Commission concluded, in its comments on Lease Sale 53, that there had been relatively fewer consistency review problems on the tracts that were included in Lease Sale 48 but were reviewed in this mediation process, than in the case of tracts from earlier lease sales consummated before California's management program went into effect. J.A. at 117-118.

[52]Moreover, as discussed *supra* at 22-28, petitioners can scarcely claim to be surprised by the lower courts' construction of "directly affecting," since it was based on the legislative history of the CZMA's original enactment in 1972, subsequent Congressional statements on the subject and the NOAA regulations.

number of occasions unequivocally expressed its intent that OCS leasing be conducted consistently with approved coastal management programs. The lower courts did no more than give effect to this intent, as well as Congress' own formulations of what it meant by "directly affecting." Petitioners' reliance upon "policy considerations" and the provisions of a different statute—which do not conflict with the interpretations of the CZMA in the courts below—provides no support for a contrary interpretation.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit that Section 307(c)(1) of the CZMA requires the Secretary of the Interior to make a consistency determination concerning Lease Sale 53, should therefore be affirmed.

Respectfully submitted,

ROGER BEERS
COUNSEL OF RECORD
KATHRYN BURKETT DICKSON
WILLIAM M. BOYD
Of Counsel
BEERS AND DICKSON
380 Hayes Street, Suite One
San Francisco, California
94102
(415) 861-1401
Counsel for Respondents
County of Humboldt *et al.**

*With assistance from
Joel R. Singer